

September 8, 2020

Texas House Committee on Insurance
Texas Capitol, EXT E2.150
P.O Box 2910, Austin, Texas 78768

RE: Legacy ER & Urgent Care interim comments on price gouging for COVID-19 testing

Dear Chairman Lucio, Vice Chair Oliverson, and Members of the House Insurance Committee:

Legacy ER & Urgent Care is an independent Freestanding Emergency Medical Facility licensed under Chapter 254 of the Texas Health & Safety Code that utilizes a hybrid billing model to bill lower acuity patients at Urgent Care rates. We are the largest provider of emergency room services with urgent care billing in the country, and unlike most emergency rooms, we only bill for the level of services needed saving our patients, their employers and insurance companies millions of dollars yearly. The result is that over 84% of our 100,000+ annual patients are billed at urgent care rates. Because of our appropriate billing and exceptional levels of care, payers see the value in partnering with Legacy and making us a part of their provider network. We do not balance bill and are proudly in-network with all payers in all of our service lines-- our urgent care, emergency physicians, and emergency care facilities are all in-network.

Our six facilities across the DFW area have assisted our community and public health network by providing rapid antigen, active swab, and antibody COVID-19 testing since the onset of the pandemic. To meet what was overwhelming demand for antigen testing, we implemented appointments for antigen testing during our urgent care hours. We are not a drive thru testing site. Our testing policy, costs, and insurance information are all clearly explained on our website and can be viewed here: legacyer.com/covid-19-testing/. If an individual comes to one of our facilities for COVID-19 testing, they are billed at the urgent care rate and a facility fee is not charged.

There have been numerous articles published recently about the freestanding emergency care facility industry charging exorbitant amounts for COVID-19 testing. We do not condone or support this behavior and it is not reflective of Legacy's care model. Our leadership team has worked very closely with members of the legislature, the Texas Association of Health Plans, and AARP to craft laws that provide greater billing transparency for patients and to prevent this type of activity from occurring. While the most recent efforts do not speak specifically to 'price gouging,' we do believe that the following laws, if enforced, will reduce price gouging not only for COVID-19 testing but for all emergency care:

House Bill 2041 (86R) by Vice Chair Oliverson

HB 2041 provides a number of patient protections related to price transparency. While this bill doesn't prohibit the type of price gouging as detailed in recent news articles, it does require Freestanding ERs to provide the patient with detailed price information. Specifically, the bill requires all Freestanding ERs, both independently licensed and hospital owned, to:

- Post specific insurance and price information on their websites;
- Use terms "in-network" or "out-of-network", prohibiting the use of confusing language such as "take insurance" or "accept insurance";

- Only use logos of insurance companies for which they are in-network; and
- Provide all patients with a disclosure statement regarding insurance status and range of fees the patient may be charged, including facility and observation fees

The Texas Health and Human Services Commission (HHSC) is charged with enforcing these requirements. HHSC surveyors are currently not conducting inspections related to HB 2041 compliance as a result of COVID-19. We are not aware of any enforcement actions but are aware of many incidents of non-compliance. The agency released draft rules that reflect HB 2041 regulations on August 31, with initial comments due by September 4. We provided comments to the draft rules and look forward to working with HHSC as they finalize HB 2041 rules.

House Bill 1941 (86R) by Representative Phelan

HB 1941 gives the Attorney General the authority to take action against freestanding ERs and certain hospitals that unconscionably bill patients for emergency services. Specifically, the bill allows the Consumer Protection Division of the Attorney General's office to bring an action against a provider that bills a healthcare service at a price more than 200% of the average charge for the same or substantially similar care provided to other individuals by emergency rooms of hospitals located in the same county or nearest county in which the emergency facility is located.

One potential issue related to the applicability of HB 1941 to the pricing of COVID-19 testing is how certain facilities compile the bill. For example, a ProPublica article entitled "How a \$175 COVID-19 Test Led to \$2,479 in Charges" published on August 1, 2020 includes a patient bill from a Texas facility that includes three separate charges for: 1) a COVID-19 antibody test, 2) a level 3 emergency department visit, and 3) blood specimen collection. Separately, these charges may not meet the 200% threshold established in HB 1941, but the total amount charged to the patient could be considered "unconscionable." It is unclear if current law gives the Attorney General the ability to utilize enforcement tools provided in HB 1941 if each individual charge in a patient's bill is technically not 'unconscionable.'

Recommendations

Work with HHSC and the Attorney General's office to enforce current law.

HHSC: As mentioned above, HHSC complaint and regular surveys of freestanding ERs have been suspended in response to COVID-19 unless it is a complaint about abuse and/or neglect. This is to help keep the flow of individuals in and out of healthcare facilities at a minimum to control the spread of COVID-19. However, it may be possible to virtually inspect a Freestanding ER for compliance with HB 2041 since the bill requires freestanding ERs to include certain information on their webpages. For example, Texas Health and Safety Code 254.155 (b)(4) requires facilities to include a link entitled "Insurance Information" on facility homepages that informs potential patients of the facility's network status. Furthermore, Texas Health and Safety Code 254.157 prohibits facilities from utilizing misleading terms like "takes" or "accepts" insurance and prohibits the use of insurance logos if the facility is not in-network with that plan. These items can be inspected for compliance without a surveyor entering a facility and we recommend HHSC do so as soon as possible, provided HHSC ensures providers are given the required due process steps for surveys. HHSC may have reinstated all survey activity after this testimony has been submitted. If that is the case, HHSC should use their full authority to ensure freestanding ERs are in compliance with HB 2041.

Attorney General: Gage whether or not the Attorney General's office believes HB 1941 gives the AG the authority to bring action against a facility taking the full cost of a COVID-19 test into account and

not just the bill's component parts. If so, the Attorney General should hold facilities accountable under HB 1941 to prevent future unconscionable billing for COVID-19 testing.

Ensure the definition of 'Price Gouging' captures gouging for COVID-19 testing.

Texas Business and Commerce Code Chapter 17.46(b)(27) states:

(27) subject to Section [17.4625](#), taking advantage of a disaster declared by the governor under Chapter [418](#), Government Code, or by the president of the United States by:

(A) selling or leasing fuel, food, medicine, lodging, building materials, construction tools, or another necessity at an exorbitant or excessive price; or

(B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, lodging, building materials, construction tools, or another necessity;

The Attorney General's Deceptive Trade Practices website states:

Please note that high prices alone do not mean that price gouging has taken place, as businesses are generally allowed to determine the prices for their products. However, if a disaster has been declared by the Governor of Texas or the President, and businesses raise the price of their products to exorbitant or excessive rates to take advantage of the disaster declaration, then it is quite likely that price gouging is taking place, and you should file a complaint with our office concerning the incident.

It is unclear if the recent examples of exorbitant COVID-19 testing prices meet the price gouging threshold due to component parts of the facility bill. If the Attorney General's office does not believe the Deceptive Trade Practices Act provides the necessary protections, we recommend amending the Act to capture these types of incidents. If the Attorney General's office does believe the Deceptive Trade Practices Act provides the necessary protections, we recommend this committee work with the AG to release a statement for consumers to be aware of price gouging for COVID-19 testing, similar to other statements released about food and fuel during a hurricane, and to hold facilities who are price gouging accountable.

While the laws regarding the state's ability to protect consumers from price gouging for COVID-19 testing may be unclear, leading to a lack of enforcement, it is clear that some providers are taking advantage of consumers seeking COVID-19 testing. We believe that state regulatory agencies do have the tools necessary to hold predatory providers accountable, and doing so would likely prevent further predatory activity during this and future disasters.

Respectfully submitted,



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Chief Medical Officer